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Amendments to professional negligence claim denied following tardy expert report

By James R.G. Cook

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Pleadings frame an action and determine the evidence that will be called at trial. The rules of pleadings generally require that a concise statement of the material facts be provided but not the evidence. In a professional negligence action, the statement of claim cannot simply plead that a defendant was negligent over a period of time. The pleading must identify how a defendant fell below the standard of care and how damage was caused as a result.

In many cases of professional negligence, an expert opinion will be required to address and identify breaches of the applicable standard of care. In some cases, the breaches that are identified by an expert opinion may not have been addressed in the statement of claim that was prepared at an earlier stage of the action. While pleadings may be amended, plaintiffs should not expect that they will be allowed to amend a claim after several years of litigation to raise new grounds of negligence that could have been pleaded earlier.

Such a situation was addressed by the Ontario Superior Court of Justice in a dental malpractice action against an oral

surgeon: *McFadden v. Psutka*, [2022 ONSC 6239 \(CanLII\)](#).

The action was commenced by the plaintiff in January 2017 against two hospitals, two radiologists, and four oral surgeons. The plaintiff was treated by one oral surgeon in the 1980s. She was treated by a second oral surgeon for several years thereafter, who performed surgeries in 2013-2015. Despite these surgeries, the plaintiff continued to complain of pain. The plaintiff sued the defendants for negligence in the treatment and surgery provided.

In August 2019, a case management judge implemented a timetable for the action. Documents had not yet been exchanged and examinations for discovery had not taken place. The plaintiff did not have any expert opinions on the standard of care, causation or damages.

All defendants were subsequently released from the action except the second surgeon. The case management judge directed the plaintiff to confirm the timeframe of treatment by the surgeon that formed the basis of the negligence claims against him.

In October 2021, plaintiff's counsel advised in writing that the allegations of negligence advanced against the surgeon related to his treatment from 2012 onward. He confirmed that the plaintiff would not advance a cause of action against the surgeon for failing to properly monitor her condition in the 1990s.

In November 2021, the case management judge approved a Fresh as Amended Statement of Claim. The judge noted that the plaintiff had failed to serve any expert reports and that it was “completely unacceptable” for a plaintiff in a professional negligence case to delay service of expert reports. The court ordered the plaintiff to serve all expert reports on which she intended to rely at trial before December 31, 2021.

The plaintiff then served an expert report from an oral surgeon dated December 8, 2021, which included opinion evidence about negligent treatment provided by the remaining defendant in the 1990s, despite the earlier commitment to limit the claim to the period after 2012.

The plaintiff then brought a motion to amend the statement of claim based on the opinions expressed in the expert report, arguing that the proposed amendments did not change the case that had been advanced against the surgeon. The plaintiff said that it was not until December 2021, when the expert report was received, that the new allegations against the defendant were discoverable. The defendant opposed the motion to amend the claim.

Under [Rule 26](#) of the Ontario [Rules of Civil Procedure](#), the court *shall* grant leave to amend a pleading on such terms as are just, unless prejudice would result which could not be compensated for by costs or an adjournment. However, the use of the word *shall* in Rule 26 does not mean that every motion to amend will be granted. A motion to amend a claim will be considered in the context of a variety of factors, including the stage at which the motion

is brought and what has transpired during the course of the action: *Avedian v. Enbridge Gas Distribution Inc. et al*, [2022 ONSC 3343](#) at paras. [33–35](#).

The test for determining whether amendments sought late in the litigation ought to be allowed, involves assessing what acts or omissions that would give rise to the defendant's liability were already at issue in the action. The court must determine whether the existing pleading already contains the “factual matrix” to support any claim to which the proposed amendment relates, or whether the amendment seeks to put forward additional facts that are necessary and material to a new and different claim: *Polla v. Croatian (Toronto) Credit Union Limited*, [2020 ONCA 818 \(CanLII\)](#), at para. [37](#).

In the motion judge's view, the plaintiff was seeking to fundamentally change the case advanced against the defendant surgeon to conform with the opinion of the expert report obtained in December 2021. The amendments sought did not simply particularize the claims of negligence but described a new theory of the case articulated by their expert.

The problem faced by the plaintiff was that the action had been ongoing for more than five years based on a different factual matrix and concerned treatment that was rendered a decade earlier. The proposed amendments essentially sought to change the history that the plaintiff had provided at her examination for discovery. Further, the defendant surgeon had consented to the release of the other defendants from the action. Had the new allegations of negligence been raised earlier, the defendant may have defended the case differently.

The motion judge found that there would be actual prejudice to the defendant if the amendments were allowed. The plaintiff's motion to amend the claim was therefore [dismissed](#).



Of note, the motion judge was critical of the plaintiff for waiting so long to serve an expert report and commented that in a professional negligence action the court would expect such opinions, even in draft form, to be in the hands of counsel at the time of the examinations for discovery so that proper, relevant questions could be asked of the parties. In this case, the plaintiff's expert was retained long after the discoveries were completed and it was too late to amend the statement of claim to conform with the opinions in the report. Plaintiffs in a professional negligence action should consider retaining an expert at an early stage and confirm that any necessary amendments to the statement of claim are addressed in a timely manner.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact James Cook, at 416.865.6628 or jcook@grllp.com.

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